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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation,
Petitioner,

vs.

ROBERT EARL MISTER, on behalf of himself and all others similarly situated,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Should this Court deny the Writ because the petitioner has failed to accurately present the elements "essential to a ready and adequate understanding of the points requiring consideration" as required by *Sup. Ct. Rule 23.1?*

II. Given that the District Court made an unchallenged finding that plaintiff established a prima facie case of disparate treatment in hiring, was it proper for the appellate court to place upon the defendant the burden of producing a legitimate nondiscriminatory reason for the disparity in its hiring practices?

III. Was it proper for the appellate court to find that the ruling of the court below was clearly erroneous pursuant to *Fed. R. Civ. P.* 52(a)?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is reported at *Mister v. Illinois Central Gulf Railroad,* 832 F.2d 1427 (7th Cir. 1987). The decision of the United States District Court for the Southern District of Illinois is reported at *Mister v. Illinois Central Gulf Railroad,* 639 F.Supp. 1560 (S.D. Ill. 1986).

RULE INVOLVED

Fed. R. Civ. P. 52(a).

STATEMENT OF THE CASE

Mister v. Illinois Central Gulf Railroad, 639 F.Supp. 1560 (S.D. Ill. 1986), *aff'd in part, rev'd in part,* 832 F.2d 1427 (7th Cir. 1987), involves a class of black applicants for unskilled railroad laborer positions who were denied employment as a result of the discriminatory hiring practices of the defendant, Illinois Central Gulf Railroad (the railroad, herein). Both the District Court and the Court of Appeals held that the plaintiffs had established a prima facie case of disparate treatment.

Many of the plaintiffs applied for laborer jobs in March, 1979 on the "4-R" project, a government-sponsored rehabilitation of 120 miles of continuous track stretching from Fulton, Kentucy, north to Bluford, Illinois (T. 590, 595, 623-24). The applicants for these jobs numbering up to 175 had first been screened by a local employment agency. All of them had indicated a willingness to relocate in order to obtain the job. (T. 191-93). Each of them had arranged for his own car transportation from the East St. Louis area where they lived to the railroad's central hiring office in Carbondale, Illinois. None of the up to 175 applicants who applied for unskilled laborer jobs on March 27, 1979 was hired; none was offered a job; and none was given an explanation or reason for not being hired. The only communication between the employment agency and the railroad regarding the rejection of the East St. Louis applicants came in the form of a telephone call from someone identifying himself as a supervisor of the railroad who asked: "Are you the guy who sent all these minorities up here today?" When the officer of the employment agency answered in the affirmative, he was told not to contact the railroad again (T. 220). Mr. Johnson, the railroad's supervisor, did not deny that this conversation took place (T. 884, lines 11-14).

Dr. Leroy Grossman, a labor economist, testified as the plaintiffs' expert at trial. Dr. Grossman performed an applicant flow analysis using three sources: the railroad's Monthly

Employment Activity Reports (MEARS herein), (Pl. Exh. 22-33); the railroad's 1591 forms (Pl. Exh. 39c); and the railroad's Answer to Interrogatory No. 6, listing applicants and hires for the years 1974-1980 (App. at 55, 56). Dr. Grossman relied on applicant flow data as the best method of discrimination analysis because the pool of people who apply constitutes the actual "supply from which the railroad can draw its labor force." Census data on the other hand is merely an attempt to replicate the information contained in applicant data (T. 1087, 1002).

The applicant flow analysis revealed that the railroad consistently hired more than twice the percentage of white applicants as compared with the percentage of black applicants (T. 1053).

	Percent blacks hired out out of blacks who applied	**Percent whites hired out of whites who applied**
1977	18.3	36.8
1978	15.5	32.9
1979	15.1	59.6
1980	1.6	15.4

(Pl. Exh. 73, Table 7, App. at 66). Dr. Grossman computed the z-scores for the years between 1976 and 1980 by measuring the differences between the percentage of black applicants hired compared to the percent of white applicants hired. A difference of approximately two standard deviations indicates a 95% probability that the differences are not random (T. 1038). In every year since 1977, the scores exceeded this level:

	z-score	**possibility of chance**
1977	3.45	.00028
1978	4.08	.000027
1979	13.40	.00000029
1980	2.93	.9917

decisions, this factor would not explain the disparity. 832 F.2d at 1432. No evidence was offered by the railroad to show that blacks lived farther from the job site than whites. The District Court's finding that the distance factor accounted for the disparity was, therefore, held to be clearly erroneous by the Court of Appeals.

As his first act, Dr. Peterson, the defendant's expert, a statistician whose book praises the applicant flow approach (T. 1821) as the preferred method of hiring discrimination analysis, also performed an applicant flow analysis. This fact was hidden from the plaintiffs, however, throughout the discovery process. The plaintiffs learned of Dr. Peterson's applicant flow analysis only on the eve of trial. Pursuant to an order of the court compelling production, the plaintiffs then obtained the results which matched those of the plaintiffs' expert, Dr. Grossman. When confronted with the results, Dr. Peterson stated that he had performed this hitherto undisclosed analysis only to determine the potential exposure of the railroad; he added that this applicant flow analysis demonstrated that: "The railroad was in deep trouble." (T. 1877).

At trial, Dr. Peterson abandoned completely this applicant flow approach, focusing instead on census data and the railroad's actual hires to construct a demographic analysis. By using only data of counties from which the railroad's actual hires occurred, Dr. Peterson was able to totally ignore in his study those counties, some of which were heavily black and closer to the job site from which no hiring had been done. Thus, Dr. Peterson's study allowed the railroad's hiring practices to be judged only by examining hiring in those counties from which it chose to hire, a practice known as "leapfrogging." The District Court was "not convinced" that Dr. Peterson's study was a complete analysis of the defendant's practices, and pointed out its most serious flaw: "By defining the labor market based on the actual hires, the approach fails to detect discriminatory practice referred to as leapfrogging." 639

F.Supp. at 1578. The District Court also held that the use of census data in itself "probably" biased figures in favor of the defendant:

> Since the jobs in question here were unskilled, and because historically blacks experienced a higher percentage of unemployment, this data tended to underestimate black availability. . . . [T]he data, would tend to inflate the estimated availability of whites, and decrease the relative availability of blacks.

Id. at 1578-79.

The District Court recognized that Dr. Peterson's study begged the question of whether the alleged distance factor accounted for the striking disparity in the railroad's hiring practices:

> Dr. Peterson's analysis proceeds on the assumption that because the defendant usually hired individuals who resided within a fifty mile radius, he could form his labor markets using the demographics of the counties from which these individuals came. However, the fact that the defendant tended to hire locally does not necessarily lead to the conclusion that this local hiring came evenly or proportionally from all the counties surrounding the job location. Defendant's Exhibits 8 through 13 show that the hiring was less than evenly distributed among the nearest surrounding counties.

Id. 1578. Although the District Court had before it evidence that the exceptions to the railroad's alleged "local hiring practice" favored whites 98% of the time (Pl. Exh. 86), the court did not reach any definite conclusion in light of the evidence of uneven hiring distribution. Instead the court stated: "*Hopefully, this distribution was a result of population and applicant flow rather than discrimination, but the Court has no way of assuring itself of this fact.*" 639 F.Supp. at 1578 (emphasis sup-

plied). The District Court demonstrated a similar indeterminancy in its final analysis of the evidence and the conclusion drawn therefrom:

> The plaintiffs' applicant flow analysis indicated that, based on applications received in the Division, there existed statistically significant differences in the percentage of black applicants as compared to black hires. The defendant's demographic analysis revealed that there existed no statistically significant differences between the percentage of blacks hired and the percentage of blacks expected to be hired based on the demographics of the surrounding areas. Viewing both results as reasonably accurate, the Court is left with one definite conclusion and two possible alternate conclusions. First, the two analyses definitely indicate that blacks applied for jobs in the St. Louis Division in greater percentage than their percentage in the diminished civilian labor force. Second, in light of this fact, and because of the different conclusions reached by the experts, either the defendant discriminated against black applicants or the black applicants, for the most part, applied for jobs when the defendant was hiring for job locations in predominately [sic] white areas. Obviously, the Court's conclusion implicitly adopts the latter alternative.

The Court of Appeals held that the defendant had failed to meets its burden of explaining a non-discriminatory reason for the disparity in its hiring practices because the evidence showed that the "distance factor," even if assumed to be an actual factor in the railroad's hiring decisions, could not account for the disparity. *Id.* at 1434-35. Furthermore, the Court of Appeals held that even if the railroad had met its burden of production, the plaintiffs' evidence proved that the proffered reason was a pretext. *Id.* at 1435.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THE PETITIONER HAS MISSTATED FACTS, FINDINGS AND CONCLUSIONS OF LAW IN THE COURTS BELOW IN ORDER TO HAVE THIS COURT EXERCISE ITS DISCRETIONARY JURISDICTION.

The Petition for Writ of Certiorari contains many inaccuracies designed to make this case appear to present questions requiring this Court's review. Thus, the petitioner has not given this Court an accurate basis upon which to grant the writ. The most material of the petitioner's misstatements follow:

1. The petitioner claims that the trial court found the railroad's attack on the plaintiffs' statistical analysis sufficient to rebut any inference of discrimination. (Petition for Writ of Certiorari at 18). This is a mischaracterization of the District Court's findings. Contrary to the petitioner's assertion, the District Court specifically found that the "defendant did not rebut this inference [of discrimination] with its attack on the data used in the [plaintiffs'] applicant flow analysis." 639 F. Supp. at 1579.

2. The petitioner states that "the Appellate Court specifically criticized *Burdine's* allocation of burdens in a pattern or practice case," and suggests that the court did not follow the court's opinion in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981) Petition for Writ of Certiorari at 17. In fact, the Appellate Court specifically stated that it assumed that *Burdine did apply* to a pattern or practice case, and proceeded to apply the *Burdine* model. 832 F.2d at 1434.

3. The petitioner states that there were 40 different job sites through the railroad's St. Louis Division and that "each job site had its own work force hired independently from other job sites". (Petition for Writ of Certiorari at 5.) This assertion is contrary to the finding at trial that all hiring for the St. Louis

Division was centralized in the railroad's Carbondale, Illinois office and that the hiring officer did not know where people would work when she made the hiring decision. (T. 588, Lane; Pl. Exh. 2 Paragraph 1).

4. The petitioner asserts that it was impossible to conduct an analysis correlating race and distance because "*no racial information* was requested on defendant's applications". (Petition for Writ of Certiorari at 19) (emphasis in original). The railroad's own evidence at trial, however, establishes that many applications were coded as to race after being received by the applicant. 639 F.Supp. at 1574. The railroad's hiring officer placed either a "1", indicating a white male or a "2", indicating a black male, on each application. *Id.*

5. The petitioner contends that "plaintiffs attempted to establish that ICG's hiring clerk applied a pass/fail 50 mile rule to its hiring decisions for each job site . . ." (Petition for Writ of Certiorari at 6). It was the defendant in its response to EEOC charges and in the deposition of its hiring officer, Mary Lane, who proffered the sole reason for rejection of plaintiffs as being that they lived in excess of 50 miles from the job site of the 4-R project. (Pl. Exh. 3,4; T 646-48. App. p. 39, paragraph 4; p. 42, Ans. 3). Such policy was applied across the board to plaintiffs as an after-the-fact reason for defendant's obvious failure to even consider them; in other words, they failed the test across the board.

Furthermore, it was plaintiffs, not the railroad, who brought out the remarkable number of exceptions - 122 - and their race - 98% white - made for persons other than the East St. Louis applicants.

In short, the Petition for Writ of Certiorari presents an inaccurate and slanted view of the case. The misstatements do not involve merely collateral matters, but go to the very heart of the reasons for which the petitioner urges this Court to exercise its discretionary jurisdiction. Supreme Court Rule 21.5

specifically provides that a petitioner's failure to present the Court with an accurate view of the case is grounds for denying the petition:

> The failure of a petitioner to present with *accuracy,* brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

Sup. Ct. Rule 21.5 (emphasis added).

Because the petitioner presents an inaccurate basis upon which this Court is asked to exercise its jurisdiction, the petitioner should be denied.

II. THE PETITION SHOULD BE DENIED SINCE THE COURT OF APPEALS PROPERLY PLACED UPON THE DEFENDANT THE BURDEN OF PRODUCING A LEGITIMATE NON-DISCRIMINATORY REASON TO REBUT THE PRESUMPTION OF DISPARATE TREATMENT ESTABLISHED BY THE PLAINTIFFS' PRIMA FACIE CASE.

Both the District Court and the Court of Appeals held that the plaintiff had established a prima facie case of disparate treatment. *Mister v. Illinois Central Gulf Railroad,* 639 F.Supp. 1560 (S.D. Ill. 1986), *aff'd in part, rev'd in part,* 832 F.2d 1427, 1431 (7th Cir. 1987). In *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 358 (1977) this Court articulated the rule that when the plaintiffs establish a prima facie case under a pattern and practice of disparate treatment theory, the burden shifts to the employer to rebut the inference that the defendant's policies are discriminatory by articulating a "legitimate nondiscriminatory reason for the rejection." Furthermore, the employer's proof must be tailored to meet the plaintiffs' prima facie case. *Id.* at 360 & n. 46. In *Texas Department of Community Affairs v. Burdine,* 450 U.S.

248 (1981), the Court described the nature of the defendant's burden, as follows:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proferred reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. *The explanation provided must be legally sufficient to justify a judgment for the defendant.*

Id. at 254-55 (citation and footnotes omitted; emphasis added).

In the case at bar, the Court of Appeals relied on *Burdine* in holding that "what the employer must 'articulate' is an *explanation* of its activity." 832 F.2d at 1434 (emphasis in original) (citing 450 U.S. at 254-55). The railroad's proffered reason, that distance accounts for the racial differences in the rate of hiring, simply did not explain the disparity on the facts of this case. As the Court of Appeals stated:

> When the defendant pronounces a reason unrelated to the plaintiff ("a midget can't do the job", followed by silence on the plaintiff's height), it has not adequately articulated a neutral reason within the meaning of *Burdine*. The employer's burden of production means that it must introduce facts sufficient in principle to explain what happened. The ICG did not need to "prove" the validity of its explanation, but it did need to give one. In a pattern-or-practice case like this the employer need not show that distance accounted for the decision concerning any particular applicant, or that distance was important to rail

> operations ("business necessity"); it had at least to produce evidence that black and white applicants lived different distances from work.

832 F.2d at 1434-35; *see also Reddit v. Mississippi Extended Care Centers, Inc.*, 718 F.2d 1381, 1385 (5th Cir. 1983).

That the defendants burden of production includes an explanation also finds support in the reasoning of the recent pronouncement of this Court in *Bazemore v. Friday,* 478 U.S. 385, 106 S.Ct. 3000 (1986). In that case, the Court held that the defendant could not meet the burden of production merely by declaring that many factors go into making up an individual employee's salary. 106 S. Ct. at 3010-3011 n. 114. The defendants failed to meet their burden because they did not "demonstrate that when these factors were properly organized and accounted for there was no significant disparity between the salaries of blacks and whites." 106 S. Ct. at 3011 n. 14. The railroad not only failed to produce any evidence indicating that blacks lived farther away than whites, but as the Court of Appeals noted, "the ICG's data support the plaintiffs' case [the black applicants did not live farther away than white applicants] rather than the ICG's." 832 F.2d at 1433. Furthermore, the plaintiffs introduced evidence showing that 98% of the exceptions to the distance rule were white (P. Exh. 86).

Contrary to the railroad's assertion, the Court of Appeals did not require the defendant to show that distance was the "true" reason (Petition for Writ of Certiorari at 26). The Court explicitly stated that under *Burdine* "the employer need only 'articulate' rather than 'prove' a non-discriminatory explanation for its conduct." 832 F.2d at 1434. Although the defendant can satisfy the burden of production by offering an untrue reason for its hiring decision, *Tye v. Board of Education of the Polaris Joint Vocational School District,* 811 F.2d 315 (6th Cir.) *cert. denied,* 108 S. Ct. 285 (1987), the reason must be one that, if taken to be true, would explain the disparity. *Texas Department of Community Affairs v. Burdine, supra.*, 450 U.S. at 254-55. Such is not the case here.

The holding of the Court of Appeals in this case is in every sense consistent with the holdings in *Burdine* and *Teamsters*. In no way has the Court of Appeals departed from the precedent set by this Court. Accordingly the petitioner does not present an issue which warrants the exercise of this Court's extraordinary and discretionary jurisdiction.

III. THE PETITION SHOULD BE DENIED BECAUSE THE APPELLATE COURT PROPERLY HELD THAT THE LOWER COURT'S RULING WAS CLEARLY ERRONEOUS UNDER *RED. R. CIV. P.* 52(A).

Contrary to the petitioner's assertion, the Court of Appeals int his case did not merely "disagree" with the result of the District Court's decision. Rather, the Court of Appeals found that the District Court's reasoning was fatally defective; the District Court assumed that the distance factor could explain the disparity when the very evidence upon which it relied contradicted such an assumption. Therefore, the Court of Appeals properly held that the District Court's ruling was clearly erroneous.

In *Anderson v. Bessemer City,* 470 U.S. 574 (1985) this Court enunciated the "general principles governing the exercise of the Appellate Court's power to overturn findings of a district court." *Id.* at 574. The Court articulates the foremost principle as follows:

> "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L.Ed. 746 (1948).

Id. at 573. That the Court of Appeals was possessed of such a definite and firm conviction that a mistake had been committed

is evidenced by the court's statement: "*It is hard to imagine a stronger case [of disparate treatment], short of an announcement of discrimination.*" 832 F.2d at 1430. (emphasis supplied).

In the District Court's "Analysis of the Defendant's Rebuttal," the Court found that "distance from the work place was a factor in the defendant's hiring decisions." 639 F.Supp. at 1577. The Court cited as the basis for this finding "Dr. Peterson's unrefuted study." *Id.* This finding is inexplicable in light of the court's criticism of Dr. Peterson's study, which emphasized that "[t]he most serious flaw in Dr. Peterson's analysis was his attempt to account for the defendant's local hiring practice." *Id.* Even less explicable is the court's conclusion that "the defendant's practice of local hiring, accounted for the differences indicated by the plaintiffs' applicant flow analysis." *Id.* at 1579. The Court refers to no basis for this conclusion independent of Dr. Peterson's study. Thus, the District Court essentially took a leap of faith in reaching its decision, failing to realize that the flaws it identified in the defendant's evidence left the most important element of proof necessary to the defendant's case without any evidentiary support. In fact, as the Court of Appeals recognized, the only evidence offered at trial probative of the question of whether the distance factor could account for the disparity showed that it could not. 832 F.2d at 1433.

The Court of Appeals agreed with the District Court's criticism of Dr. Peterson's study. Judge Easterbrook, however, using a strikingly revealing example, identified not only the flaws of the study, but also the *significance* of the flaws, which the District Court had erroneously ignored:

> The District Court was not convinced by this evidence, 639 F.Supp. at 1577-79, and we are not either. The unweighted studies have nothing to do with the distance of potential workers (and their counties) from the ICG's places of

work; they call into question the implicaitons of the plaintiffs' applicant flow studies but do not verify the ICG's distance defense. The weighted portion of the study, which the ICG believes cures that defect, begs the question. It assumes what is to be proven—that differences in hiring are attributable to distance rather than race. The expert derived the weights from the ICG's hiring rather than from distance. So if the ICG hired one person from an all-black county with a labor force of 100 and 10 people from an all-white county with a labor force of 100, the expert would assign the black county a weight of 0.10 and deduce that the ICG was "expected" to hire only one person from it—even if the black county were closer to the ICG's places of work than the white county. Voila! Discrimination itself produces a statistical finding of no discrimination.

. . . .

So the defendants' statistical work simply does not show that distance accounts for the racial differences in the rate of hiring. The District Court found that the ICG used distance as a ground of decision and apparently believed that his finding carried the day for the railroad on the disparate treatment claim. But it does not; there must be a causal link between criterion and consequence. Only that causal link would compel the plaintiff class to demonstrate (in the disparate treatment portion of the litigation) that the railroad was using distance to get at race (because of, not just in spite of, its disparate consequence). The *only* piece of evidence providing the causal link was the statistical study, which the District Court set aside (correctly, we have held). That left the ICG's burden-of production unsatisfied.

832 F.2d at 1433-34 (emphasis in original). Thus, the Court of Appeals properly held that the railroad's "explanation explains

nothing" and that "the District Court's contrary conclusion is clearly erroneous." *Id.* at 1429.

The petitioner cites several cases in connection with the assertion that an Appellate Court must "wholly defer" to the District Court's determination regarding statistics and the testimony of expert witnesses. However, in *Soria v. Ozinga Brothers, Inc.*, 704 F.2d 990 (7th Cir. 1983), a case cited by petitioners for this proposition, the court carefully scrutinized the statistical and other evidence, analyzed the many flaws in the plaintiff's evidence, which the District Court properly recognized, and concluded that "we agree with the District Court that the plaintiff failed to meet his burden of proof." *Id.* at 994. In *Soria,* unlike the case at bar, the appellate court was not presented with a manifestly erroneous resolution of the evidence.

Clearly, the federal appellate courts have not only the power but the duty to examine the supporting evidence on which the District Court bases it findings and conclusions. *See Bazemore v. Friday,* 106 S.Ct. at 3010-11 (1986) (holding that "although we think that consideration of the evidence makes a strong case for finding the District Court's conclusion clearly erroneous, we leave that task to the Court of Appeals on remand which must make such a determination based on the 'entire evidence' in the record"). *See also Detroit Police Officers Association v. Young,* 608 F.2d 671, 687 (6th Cir. 1979), *cert. denied,* 452 U.S. 938 (1981); *Pettway v. American Cast Iron Pipe Co.,* 576 F.2d 1157, 1183 (5th Cir. 1978), *cert. dismissed,* 467 U.S. 1247 (1984). Furthermore, if the District Court's resolution of the evidence is clearly erroneous, as in the case at bar, the decision must be reversed. *Bazemore v. Friday, supra.,* 106 S.Ct. at 3010-11. The petitioner's contention that any critical examination of the supporting evidence constitutes an impermissible de novo review is, therefore, without any merit.

The Court of Appeals, in the instant case, properly applied the clearly erroneous standard of review. The District Court's